The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam,

Inquiry into the Australian Jobs Bill 2013

The Minerals Council of Australia (MCA) retains serious concerns about the potential harm of the Australian Jobs Bill 2013. Indeed, variations from the Exposure Draft Bill released in April have increased concerns.

The MCA made representations to the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education on the Exposure Draft of this Bill in April, a copy of which is attached to this letter. Apart from the changes addressed below, the April submission remains our assessment of the proposed legislation, specifically, that the measures are cumbersome, ill-defined, incomplete and, most significantly, counterproductive.

Mining projects already generate large benefits for Australian industry. Market realities dictate that the Australian minerals industry has a strong interest in the development and maintenance of a vibrant and competitive domestic supply base. The exploration, mining and processing of minerals underpins vitally important supply and demand relationships with, inter alia, domestic manufacturing, construction, financial, legal and other professional services, process engineering, property and transport sectors.

The economic case for the intervention in the commercial operation of companies, combined with additional, duplicative reporting requirements has not been made. The interference in commercial arrangements will undermine investment confidence and potentially result in costs and delays and leave companies open to third party interference.

Some changes to the Bill from the exposure draft require reconsideration:

- Trigger arrangements – while Government recognises the impracticality of writing a participation plan before a project has been design, the new two-tiered arrangement still puts considerable administrative burdens on proponents to devise plans and draft proposals on projects which may not proceed or may be significantly modified before the procurement stage.
- Disclosure provisions (Part 9) – the confidentiality provisions do not prevent the release of commercially sensitive information to suppliers through fora such as the Industry Capability Network.
- Reporting (section 22) – the Bill now brings forward the release of reporting plans and removes the discretion of the Australian Industry Participation Authority (AIPA) over release. This may distort the

market to the disadvantage of proponents where there are particular commercial sensitivities – for example, a limited number of market participants.

- Indexation – the removal of the indexation arrangements for liable projects means that over time more and more projects will be roped in requiring even greater resources for the AIPA.
- Obligations regarding global supply chains (Sections 36f and 40f) – the Bill requires the proponent to make judgements about supplier companies' capability, management and commercial goals in meeting the obligations to encourage participation in global supply chains.

Finally, MCA remains concerned by the statements in the Regulation Impact Study that there was no need to consult with the industry on the basis of other submissions made about previous, different changes to the law. This appears to be poor consultation process.

Yours sincerely,

Sid Marris
Director – Industry Policy
Minerals Council of Australia
28 May 2013.

Minerals Council of Australia

Australian Industry Participation Program
Department of Industry, Innovation, Climate Change
Science, Research and Tertiary Education
Canberra

Via email: aiplegislation@innovation.gov.au

Re: Australian Jobs Bill 2013 - Exposure draft

Dear Sir/Madam,

The draft Australian Jobs Bill 2013 (the "draft Bill") is of profound concern to the minerals industry in both a policy and a practical sense. Its measures are cumbersome, ill-defined, incomplete and, most significantly, counterproductive.

The Minerals Council of Australia's broad concerns relating to the further extension of interventionist policy measures were expressed in its submission made prior to the previous set of changes introduced less than one year ago. Those concerns still stand.

Mining projects already generate large benefits for Australian industry. Market realities dictate that the Australian minerals industry has a strong interest in the development and maintenance of a vibrant and competitive domestic supply base. The exploration, mining and processing of minerals underpins vitally important supply and demand relationships with, inter alia, domestic manufacturing, construction, financial, legal and other professional services, process engineering, property and transport sectors.

The economic case for the intervention in the commercial operation of companies, combined with additional, duplicative reporting requirements has not been made. The interference in commercial arrangements will undermine investment confidence, potentially result in costs and delays and leave companies open to third party interference.

Since those concerns were originally expressed, more evidence has emerged which, we submit, shows that the draft Bill will fail to achieve its purpose. Rather than supporting the creation and retention of Australia jobs the draft Bill threatens jobs by tying up projects in red-tape and reducing competitiveness.

Overall, the draft Bill represents a disturbing regulation of commercial decisions. It contains a legislated timetable of action which in some instances appears impossible to meet and in others appears to breach legal requirements on market disclosure and fiduciary responsibilities.

The draft Bill should be reconsidered.

Policy concerns

Mining already makes a big contribution…

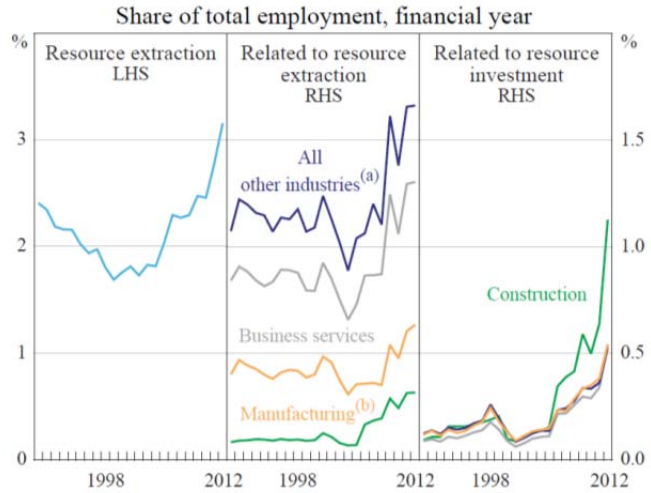
Annual mining investment has increased more than three-fold over the past decade generating increased employment both in operations (extraction and processing) and in the construction, manufacturing, equipment, technology and services firms that are directly related to mining and investment.

Reserve Bank of Australia research has found that mining's contribution to the economy is far larger than previously thought – both in the size of its core activity of extraction and processing and on the industries immediately dependent on mining.[1]

While typically mining has been described as accounting for 8 per cent of gross domestic product, the RBA suggests that, in gross value added terms, the extraction and processing element is as high as 11 ½ per cent of GDP, while the total contribution is as high as 18 per cent. This may be underestimated as it does not capture the full gamut of mining services. Economist Ed Shann suggests the figure could be as high as 22 per cent of GDP.[2]

Similarly with employment, while extraction employment is as high as 3 ¼ per cent of total employment (up from below 2 per cent just under a decade ago), total employment is double this amount (6 ¾ per cent of employment.) Indeed, the directly related construction, manufacturing and service providers are a larger share of the total resources workforce than the core extraction and processing workers. Employment in resource related manufacturing (that is broader manufacturing not site specific manufacturing) has increased over recent years with the rise in investment. The share of workers employed directly in extraction has accounted for only one quarter of the rise in employment since 2004-05.

Reserve Bank of Australia discussion paper, employment dimensions of the mining sector



Notes: (a) Includes agriculture, forestry & fishing; electricity, gas, water & waste services; wholesale trade; retail trade; transport, postal & warehousing and household services

(b) Excludes resource-specific manufacturing

Sources: ABS; authors' calculations

[1] V. Rayner and J. Bishop, Industry dimensions of the resources boom: An input-output analysis, Research Discussion Paper, Reserve Bank of Australia, 2013.

[2] E. Shann, Maximising growth in a mining boom, Minerals Council of Australia, March 2012.

Earlier RBA work[3] noted that tracking the contribution of mining is challenging and that some of this flows from the changes within industry sectors (that is, between sub-sectors). There has been large variation in the pace of output growth within different parts of the manufacturing and construction industries, partly depending on whether their products and activities are used by the mining industry. This intra-industry variability could be one reason why the typical structural change indices suggest that to date the overall pace of change of the real output shares and employment between industries has not changed significantly from that prevailing since the mid-1990s.

Mining supports a growing manufacturing, equipment and technology niche…

Further proof of the contribution that mining investment is already making to the broader economy is outlined in the work of Don Scott-Kemmis in a recent monograph for the MCA entitled *How about those METS? Leveraging Australia's mining equipment, technology and services sector.* [4]

The monograph notes that in 2012, the mining-related sales of the Mining, Equipment and Technology Services (METS) sector exceeded $71 billion and overall employment was at least 265,000. METS sector exports exceed $12 billion and offshore sales (including exports and offshore business) make up over a third of the METS sector's income, making it one of the most internationalised Australian sectors.

Surveys indicate that Australia's METS sector has grown roughly five-fold over the past 15 years so that today there are well over 270 firms, many leaders in their niche. Driven by the expansion of mining investment and production both within and outside Australia, the sector has achieved a remarkable level of internationalisation, with the majority of firms having offshore offices or subsidiaries.

The emergence and growth of the METS sector arose from the combination of the challenges faced by mining companies and the capabilities of Australian firms to develop solutions to those challenges. While some firms in the sector have been in existence for more than 100 years, others are recent entrepreneurial ventures. The sector is highly diverse, ranging from large contract mining companies to small specialised consultants, and from firms that modify large imported equipment to those that design and produce specialised instruments and equipment tailored to Australian operations.

There are at least 100 significant service companies, including engineering and consulting firms and contract mining and construction firms, with estimated total sales in 2012 of around $55 billion. More than half of the mining services firms are privately owned. Perhaps a third of total sales ($20 billion) are in offshore markets.

The segment of firms that manufacture and/or supply equipment includes more than 30 major companies – both multinational and Australian. In 2012, they employed more than 30,000 people and had total sales of at least $14 billion.

The segment of technology companies includes at least 50 dedicated firms based on two sub-segments:

- information technology; and
- specialised equipment (control, scanning, simulation and mineral processing technology).

In 2012 these firms had total IT-related sales of more than $1 billion, of which almost 50 per cent were exports, and employed an estimated 6,000 people.

[3] E. Connolly and D. Orsmond, The mining industry: From bust to boom, Research Discussion Paper, Reserve Bank of Australia, December 2011.
[4] D. Scott-Kemmis, How about those METS? Leveraging Australia's mining equipment and technology services, Minerals Council of Australia, March 2013

Viewed at this more granular level, the METS sector includes many small and specialised firms. In 2008-09, about 40 per cent had less than 10 employees and only about 7 per cent of firms had more than 300 employees.

As befits an open, globalised economy such as Australia, offshore activity – Australian firms operating overseas – has grown rapidly over the past decade, in response both to growing offshore demand and to the strengthening capabilities of Australian METS firms.

Australian firms benefit…

As outlined in the December 2011 submission on industry policy, MCA member companies already make substantial purchases locally on major projects and generally achieve high levels of Australian content. In 2009, the mining industry's total demand for goods and services was $85.7 billion, of which $75.8 billion (88%) was supplied by local industry. Within this total:

- 53.3% of iron and steel used by the mining industry was locally supplied;
- 64.6% of structural metal products used by the mining industry was locally supplied; and
- 71.7% of sheet metal products used by the mining industry was locally supplied.[5]

Other data from major mining states highlights further the degree to which both local business opportunities and broader societal benefits are being generated by the mining sector in Australia. For example, in 2011-12 the Queensland resources sector purchased $28 billion in goods and services from employing Queensland businesses, up from $21 billion in 2010-11 and $18.8 billion in 2009-10. Around 80 per cent of Queensland postcodes benefited directly from this expenditure.[6]

A 2011 internal study for Western Australia's resources industry shows a continuing high level of local industry participation in mining sector supply chains with 86% of spending sourced domestically in the construction phase and 95% in the operations phase of West Australian projects. With the large expansion of West Australian mining projects, operations expenditure has increased substantially providing sustained opportunities for local suppliers.

Naturally, METS suppliers are looking for more opportunities. Those involved in the industry emphasise the importance of direct and long-lasting relationships across the life of projects and a capacity for problem solving. Indeed, there is an argument that the issue for increasing METS sector performance is to improve the commercialisation, quality assurance and reducing the "integration risk" of products used throughout the life of an operation rather than de-facto mandated local content focussed on the construction phase.

This growth in mining related manufacturing is the product of deliberate action of governments over the past thirty years to encourage competition as the driver for innovation, versatility and lower costs.

Unfortunately, Australia has seen its cost base rise significantly over the past three years and to place further barriers to competition will only exacerbate the trend.[7] Indeed, such a "closed market" approach is bad for Australian businesses as it removes the drive to innovate – a drive inspired by competition. From an efficiency perspective, it is critical that companies and individual projects reserve the right to pursue low cost, technologically advanced and compliant tenders within the broader consideration of sustainability and local content factors without further administrative burden and complexity. Businesses and State Governments

[5] Maximising Australia's Resources Boom, A report prepared for the Australian Steel Institute prepared by the National Institute of Economic and Industry Research, July 2011, pp. 40-42

[6] Queensland Resources and Energy Sector Code of Practice for Local Content, March 2013 and "Resources projects provide $21 billion stimulus to Queensland suppliers", Queensland Resources Council Media Release, 29 November 2011.

[7] See Port Jackson Partners, Earth, fire, wind and water: Economic opportunities and the Australian commodities cycle, ANZ Insight, August 2011; and Port Jackson Partners, Opportunity at Risk: Regaining our competitive edge in minerals resources, Minerals Council of Australia, September 2012.

recognise that voluntary codes can help assist information flows without undermining vital competition effects.[8] This commercial dynamic is powerful and ill-considered meddling can have lasting effects.

Practical concerns

The Commonwealth Government's policy released last month, *A Plan for Australian Jobs*, has two elements pertinent to this discussion:

- broader application of the requirement to lodge Australian Industry Participation (AIP) plans;
    - any project worth $500 million must lodge a plan which provides for Australian entities to have an opportunity to bid for supply. This plan is lodged with a new Government body, the Australian Industry Participation Authority (AIPA) for approval; and
- any project worth over $2 billion which is seeking tariff relief under the Enhanced Project By-law Scheme (EPBS), will be required to "embed" a public servant as part of their procurement team.

This draft Bill relates only to the first element and there has been no mention of when the details on the other part(s) will be released.

AIP plans have been part of the administrative law landscape of Australia for many years. Their role has been as part of the accountability of participants in the EPBS, as a scheme that allows for tariff relief for major capital imports. As the Regulation Impact Study accompanying the draft Bill notes this is a voluntary scheme. While the MCA has long argued that the requirements under the EPBS are more onerous than necessary, the costs of the imposition carried a partial offset.

The draft Bill, extending the requirements to any project in excess of $500 million, creates an imposition with no offset.

Lack of understanding…

The draft Bill has been written with little understanding of the dynamics of multi-million dollar investment projects. Project proponents rely on contractual arrangements with turn-key construction companies, but the legislation puts the onus of responsibility solely on the project proponent (Section 9). Given a range of State schemes already in place, this Commonwealth initiative puts further burdens on the project proponent to direct the policy and actions of the contractor which can only be achieved by placing more complexity into project contracts.

In joint ventures, it is not uncommon for one proponent to take responsibility for management of the project, but the draft Bill places the onus on all proponents (section 63). These provisions are impractical and will lead to additional costs.

Powers too broad…

The AIPA, created under this draft Bill, has a broad remit, wide scope to demand information and the ability to seek court injunctions (Parts 4 and 5). At the same time it cannot be sued for damages even though firms bear commercial risk for decisions made under the AIPA's rubrics (section 126).

The draft Bill provides that the AIPA must approve company project plans. The criteria are broadly laid out in Section 35. But it is not clear how companies can assure themselves that they have done sufficient to gain approval at each individual project as this appears open to interpretation and prevailing issues at the time. Section 18 gives such broad discretion to the AIPA that there appears no objective measure of compliance. For

[8] Queensland Resources and Energy Sector Code of Practice for Local Content, March 2013 https://www.qrc.org.au/_dbase_upl/Local%20Content%20Code%20of%20Practice.pdf

example, as part of the Proponents' compliance, they must demonstrate a "broad understanding of the capability and capacity" of the Australian supply entities. The test for this broad understanding is not clear.

The AIPA has broad scope to group developments under a single project banner for the purposes of an AIP. The rules for doing so are loosely defined. Similarly, the Minister, by way of a legislative instrument (a regulation) can declare an eligible facility (Section 6), or direct project proponents to provide a breakdown of goods and services for publishing purposes, but there is no guidance on the extent of this reporting (section 36).

The changes stray into the domain of companies' commercially sensitive information. Estimates on local content and on reporting outcomes could be used by competing suppliers (domestic or international) to obtain competitive advantage. Estimates that precede the bidding process may affect the willingness of domestic or international parties to become involved depending on what levels have been estimated and unduly influences an open and transparent procurement process. Secrecy provisions do not allow for preventing misuse of information by third parties for commercial or non-commercial gain (Part 9). There is insufficient guidance in the legislation on what information it is appropriate for the new AIPA to demand. An unfettered right to claim any commercial document constitutes an excess of power (Sections 50, 55 and 56).

Flowing from this, companies should retain the right to approve information about their projects that the AIPA is seeking to publish on its website (Section 22).

The definition of an eligible facility (Section 6) fails to understand the nature of minerals and, combined with the other provisions, would mean that even small specific extensions to a mine's operation could be drawn into a larger development. The effect of these provisions is that all mining would be subject to the onerous new reporting provisions not just so-called large projects of $500 million or more.

There is an inconsistency in the draft Bill, where Section 6(c) looks to specifically include wharf/port facilities as eligible facilities when the same facilities are expressly excluded from coverage under the EPBS as administered by the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education. The Department does not recognise single user port expansions for EPBS purposes, but seeks to include them in the draft Bill.

Potential breach of other statutory requirements…

As stated above, the draft Bill shows little understanding of the dynamics of multi-million dollar investment projects. This is most evident in the application of the "trigger" date for lodgement of an AIP plan (sections 13, 17).

The legislation provides for plans to be provided to a third party – initially the AIPA – before projects have been through proper due diligence and fiduciary responsibility requirements within companies. This is not only impractical; it may constitute a breach of stock exchange listing rules on continuous disclosure.

Some projects never pass beyond the scoping or feasibility stage for a range of commercial or technical reasons or consideration under what is described as the "social licence to operate" (such as environmental or community reasons) yet this draft Bill places a legal obligation on a company to draw up a detailed action plan. The draft Bill creates a prospect of companies suffering considerable time and expense for no return should the project not proceed.

These faults in the operation of the trigger provisions become most apparent with the requirement that project proponents are required to lodge a draft plan 90 days before the commencement of a concept design stage. It would be impossible to map out a participation plan before the concept has been developed. The other trigger

points defined in the legislation appear premature, such as the beginning of an Environmental Impact Assessment process or determining which standards would apply to key goods and services, and run the risk that companies will be forced to accept a more expensive or inferior product or service in order to meet legislated obligations.

Costs unrealistic…

The Regulation Impact Study's (RIS) estimates on costs to business do not appear realistic. All projects bear costs involved in being properly informed about potential suppliers in Australia. This draft Bill places an obligation on a company being able to demonstrate, to a level that would satisfy a Court, that this action has been properly carried out. Such a demonstration would be considerably more expensive than the $8,922 per project estimated in the RIS.

Similarly, as there is no draft legislation available, it is impossible to confirm whether the RIS's estimated compliance costs for embedding a public servant in a procurement team are accurate.

Conclusion

The draft Bill goes further than existing provisions which themselves are less than 12 months old. The uncertainty created by the continued change in the makeup of AIP plan regulations will only serve to delay further investment and undermine the ability of project proponents to provide more opportunities for Australian suppliers and their employees. The draft Bill will not work properly and will be counterproductive. It should be reconsidered.

If you have any further questions, please contact me

Yours sincerely,

Sid Marris
Director – Industry Policy
Minerals Council of Australia
10 April, 2013